DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 N. Capitol Street, NE, Suite 9100
Washington, DC 20002

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS Petitioner, v. DC-WATER AND SEWER AUTHORITY Respondents	Case Nos.: CR-I-05-N100140 CR-I-05-N100139

FINAL ORDER

I. Introduction

These consolidated cases arise under the Civil Infractions Act of 1985, as amended, D.C. Official Code §§ 2-1801.01 *et seq.*, and Titles 12E and 17 of the District of Columbia Municipal Regulations ("DCMR"). By Notice of Infraction (No. N100139) served April 15, 2005, the Government charged Respondent DC Water and Sewer Authority[1] with one count of violating 17 DCMR 400 (failure to provide24-hour licensed engineer coverage; no license posted; danger and

[1] By consent motion at the September 9, 2005 hearing, the parties moved to dismiss Michelle Ware as a named respondent in these proceedings, and that motion was granted. In addition, the caption has been amended to reflect the proper name of the remaining respondent.

not approved stickers placed on boiler).[2] The Government charged that the violation occurred on March 24, 2005 at 301 Bryant Street, N.W. (the "Station"), and sought a fine of $500.

By Notice of Infraction (No. N100140) also served April 15, 2005, the Government charged Respondent with violating 17 DCMR 400 (unlicensed engineer; no licenses posted at the site in the boiler room) and 12E DCMR M-1013.9.1 (unauthorized removal of unsafe to use

[2] 17 DCMR 400 provides:

> The operation and maintenance of the following equipment shall be exempt from the requirement of having licensed operating engineers:
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> (a) Vehicles operated under the regulations of the D.C. Public Service Commission or the U.S. Interstate Commerce Commission;
>
> (b) Machinery on boats or vessels operated under the regulations of the United States Coast Guard;
>
> (c) Automotive vehicles used solely for traction purposes;
>
> (d) Packaged, self-contained air conditioning units;
>
> (e) Automatically operated air conditioning systems with non-toxic and non-inflammable refrigerant and not over a total of one hundred twenty-five (125) compressor horsepower, where no one refrigerant circuit is in excess of seventy-five (75) horsepower;
>
> (f) Automatically operated air conditioning systems using the heat absorption cycle with a non-toxic and non-inflammable refrigerant and not over a total of one hundred twenty-five (125) tons of refrigeration, where no one refrigerant circuit is in excess of seventy-five (75) tons, except where a boiler of a type and capacity that requires a licensed engineer is used;
>
> (g) Cold storage and refrigeration systems using non-toxic and non-inflammable refrigerant not in excess of seventy-five (75) compressor horsepower;
>
> (h) Cold storage and refrigeration systems using the heat absorption cycle with a non-toxic and non-inflammable refrigerant not in excess of forty (40) tons;
>
> (i) Cold storage and refrigeration systems using toxic or inflammable refrigerant not in excess of five (5) compressor horsepower;
>
> (j) Cold storage and refrigeration systems using the heat absorption cycle with a toxic or inflammable refrigerant not in excess of three (3) tons;
>
> (k) Automatically operated pumping stations;
>
> (l) Hot water heating boilers where the total boiler horsepower is not in excess of seventy-five (75) horsepower [sixteen thousand eight hundred square feet (16,800 ft.<2>) of water radiation at one hundred fifty degrees Fahrenheit (150 [degrees] F.)];
>
> (m) Air compressors having a capacity of less than one hundred ten cubic feet per minute (110 ft.<3>/min.) at one hundred pounds per square inch (100 lbs./in.<2>) pressure;

notice).[3] The Government charged that the violations occurred on April 6, 2005 at the Station, and sought a total fine of $550.

Upon Respondent's answer and plea of Deny, an evidentiary hearing was convened on September 9, 2005. Matthew Green, Jr., Esq., appeared on behalf of the Government, and Meena Gowda, Esq., appeared on behalf of Respondent. Due to the complex technical nature of the violations as described and the stated proffers of the parties, this administrative court required the filing of a joint-proposed prehearing statement by October 14, 2005. The parties

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(n) Motor or engine driven electric generator sets used for welding or lighting not in excess of fifty kilovolt amperes (50 KVA); or

(o) Low pressure steam boilers having gravity or trap returns.

400.2. The operation and maintenance of the following equipment shall be by or under the daily supervision of a steam or other operating engineer who is duly licensed in the proper class by the Board of Examiners for Steam and Other Operating Engineers in the District of Columbia:

(a) Boilers and boiler auxiliaries;

(b) Steam engines;

(c) Refrigeration equipment with non-toxic and non-inflammable refrigerant driven by electric motors in excess of twenty-five (25) horsepower;

(d) Refrigeration systems using the heat absorption cycle with non-toxic and non-inflammable refrigerant;

(e) Refrigeration systems of five (5) or more compressor horsepower using a toxic or inflammable refrigerant;

(f) Refrigeration systems of three (3) or more tons using the heat absorption cycle with a toxic or inflammable refrigerant;

(g) Internal combustion engines in excess of twenty-five (25) horsepower; and

(h) Air compressors driven by electric motors or internal combustion engines.

[3] 12E DCMR M-1013.9.1 provides:

> Whenever the boiler inspector finds that a boiler or unfired pressure vessel, or its necessary appurtenances, is in such a defective or unsafe condition that life or property is endangered, he or she shall immediately order its further use and operation discontinued. If, in his or her opinion, it cannot be repaired and made safe, he or she shall condemn it.

filed their joint proposed prehearing statement on October 7, 2005, and the evidentiary hearing re-convened on October 20, 2005.[4]

Matthew Green. Esq., appeared at the October 20th hearing on behalf of the Government, along with Keith Jones and William Tyson who appeared as witnesses for the Government. Meena Gowda, Esq., appeared at the hearing on behalf of Respondent, along with Michael Littleton and Louis Klinefelter who appeared as witnesses for Respondent.

Based on the testimony of the witnesses and my evaluation of their credibility, the admitted documentary evidence and the entire record in this matter, I now make the following findings of fact and conclusions of law:

II. Findings of Fact

At all times relevant to this matter, Respondent operated a pumping station (the "Station") at 301 Bryant Street, N.W. Joint Proposed Pretrial Statement ("JPPS") at 1. The Station houses motor driven water pumps, transformers, low-pressure hot water boilers, chillers, low-pressure steam boiler, chilled water pumps, boiler recirculation pumps, hot water heater pumps, and a heat pump in separate parts of the Station. JPPS at 1; Respondent's Exhibits ("RX") 200 and 200-A. There are no high-pressure boilers in use at the Station. JPPS at 1, RX 200. Respondent has a third-class licensed engineer inspect the Station's boilers once every 24 hours. JPPS at 1.

[4] On September 23, 2005, Respondent filed a motion to dismiss Case No. CR-I-05-N100140 as the alleged violation therein stemmed from the same activity giving rise to the violations set forth in Case No. CR-I-05-N100139. The Government has opposed this motion. As the Notices of Infraction in question either identified separate violations (unlicensed engineer vs. sticker removal), or if the same violation, indicated a continuing but separate violation (March 24 vs. April 6, 2005), Respondent's motion to dismiss was denied.

A. The Station Inspections

There is conflicting evidence in these cases as to when the Government's inspection(s) of the Station took place. The Government charged that violations occurred either on March 24, 2005 or April 6, 2005, suggesting that Station inspections took place on those dates. During direct examination and cross-examination, however, the charging inspector made no reference to March 24th or April 6th, but instead testified repeatedly that he inspected the Station on April 11, 2005. The Government's other witness provided no indication as to when he observed the alleged violations, except to say that he attended at least one of the Station inspections with the charging inspector, and generally concurred with his observations regarding the Station. In addition, the Government's documentary evidence indicates that an inspection occurred on March 1, 2005. Petitioner's Exhibits ("PX") 102 and 108. As a result, this administrative court can make no findings as to the specific inspection dates of the Station.

B. Removal of Notice

On or about March 24, 2005, Mike Littleton, Respondent's HVAC foreperson at the Station, removed a sticker that had been previously placed on at least one of the Station's boilers by DCRA inspectors indicating that it was unsafe to operate. Mr. Littleton removed the sticker based on a telephone conversation with a representative of DCRA who advised that the Station could continue to run the boiler until sometime in April, 2005 pending the completion of certain unspecified corrections. While I find that the Station was permitted to run the boiler in question as specified, I do not find that the removal of the sticker was authorized.

III. Conclusions of Law

Due to the conflicting testimony and documentary evidence in these cases, this administrative court cannot conclude by a preponderance of the evidence that Respondent violated 17 DCMR 400 on March 24, 2005 and April 6, 2005 as charged in the Notices of Infraction. *See* D.C. Official Code §§ 2-1802.01(b)(3) and 2-1802.03(a). On both direct and cross-examination, the charging inspector steadfastly referred to an April 11, 2005 inspection date. In addition, the documentary evidence indicates at March 1, 2005 inspection date, a date never referenced in the testimony. PX 102 and 108. While one can speculate as to why the April 11th date was referenced (see date of completion for the Notices of Infraction at issue), this administrative court cannot substitute that speculation for that which is the Government's burden to establish, *i.e.*, that the violations set forth in the Notices of Infraction occurred on the dates alleged. D.C. Official Code § 2-1802.03. Accordingly, I conclude that Respondent is not liable for violating 17 DCMR 400 as charged in the Notices of Infraction, and those charges shall be dismissed.

This administrative court concludes, however, that the Government has proven by a preponderance of the evidence that Respondent removed the unsafe sticker on the boiler at the Station as charged. While this administrative court might appreciate Respondent's possible confusion over the issue, nothing in the evidentiary record provides a sufficient justification for Respondent's removal of the sticker, notwithstanding whether the sticker should have been placed there in the first instance. *See* 12E DCMR M-1013.9.1 (authority to suspend boiler operation based on inspector's determination of emergent conditions; not whether those

conditions actually existed).[5] A fine of $50 is authorized for a violation of 12E DCMR M-1013.9.1, which shall be imposed. 16 DCMR 3306.4.4(b).

IV. Order

Based upon the above findings of fact and conclusions of law, and the entire record of this case, it is this _____ day of _____ 2005:

ORDERED, that Respondent is **NOT LIABLE** for violating 17 DCMR 400, as charged in Notices of Infraction (N100139 and N100140) and those charges are hereby **DISMISSED**; and it is further

ORDERED, that Respondent is **LIABLE** for violating 12E DCMR M-1013.9.1 as charged in Notice of Infraction (N100140); and it is further

[5] Much of the testimony in the case addressed the technical issue of whether, given the various types of equipment at the Station, the Station's level of monitoring its boilers was adequate. The parties contended that the resolution of this issue centered on whether or not an "aggregate horsepower" calculation was appropriate for the Station. Because this administrative court has determined that, with respect to two of the three charges set forth in the Notices of Infraction, the Government failed to establish the days on which the alleged violations took place, it need not address this more substantive issue. *See generally Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U.S. 206, 216 (1908) (Justice Holmes noting, "We decide only what is necessary."). This administrative court notes in passing, however, that the aggregate horsepower concept commingles very distinct issues in this case: specifically (1) whether 24 hour monitoring is required at the Station; (2) if so, what class of engineer should do the monitoring, and (3) identifying where that engineer should display his or her credentials. The applicable regulations provide that only "high pressure boilers" require continuous monitoring. 17 DCMR §§ 401.4 and 499. The Government presented no evidence to indicate whether any of the boilers at issue, whether alone or in the aggregate, should be considered high-pressure boilers for purposes of the applicable regulations. Respondent presented uncontroverted testimony that no high-pressure boilers were in use at the Station. And while, as the Government correctly noted, it is the aggregate horsepower (with specified exceptions) that controls the *class* of engineer required for a given job, *see* 17 DCMR 403.2, aggregate horsepower does not control whether 24 hour monitoring of boilers is required in the first instance. Nor, despite the Government's tacit contention, is there any requirement in the applicable regulations that the posting of the engineer's credentials, assuming one is necessary, be on or even near the equipment to be monitored. *See* 17 DCMR 407.6 (requiring each license to be displayed merely "in a prominent place in the plant where the licensee is employed"). As such, this administrative court is not convinced that a contrary result would occur had the substance of the Government's charges been addressed more fully.

ORDERED, that Respondent shall pay a fine in the total amount of **FIFTY DOLLARS ($50)** in accordance with the attached instructions within 20 calendar days of the mailing date of this Order (15 days plus 5 days for service by mail pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondent fails to pay the above amount in full within 20 calendar days of the date of mailing of this Order, shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting 20 calendar days after the mailing date of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondent pursuant to D.C. Official Code § 2-1802.03(i), and the sealing of Respondent's business premises or work sites, pursuant to D.C. Official Code § 2-1801.03(b)(7); and it is further

ORDERED, that the appeal rights of any person aggrieved by this Order are stated below.

November 2, 2005

/S/

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Mark D. Poindexter
Deputy Chief
Administrative Law Judge